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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1972

No. 72-477

EDWARD L. STEPHENSON, GARRICK C. STEPHENSON and THE CENTRAL TRUST COMPANY, as Trustees of Samuel F. Stephenson,

Petitioners,

against

KARL F. LANDEGGER, CARL C. LANDEGGER, GEORGE F. LANDEGGER, PARSONS & WHITTEMORE, INC. and THE BLACK CLAWSON COMPANY,

Respondents.

PETITIONERS' REPLY TO RESPONDENTS' BRIEF ON PETITION FOR A WRIT OF CERTIORARI

ABRAHAM K. WEBER,
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1. Respondents' brief ignores relevant points and questions contained in the petition for certiorari; cites cases having nothing to do with the narrow issue involved; advances no valid reason why, if Petitioners were eligible to sue for Clawson's benefit as to post-February 24, 1969 wrongs (as the District Court and Court of Appeals squarely held), they should not be permitted to continue the Stephenson action but start anew in a State court; and make the specious argument that because Petitioners will, some day, finish their duties as Trustees, they were without standing to pursue derivative claims for Clawson's benefit.

2. On the critical question whether Petitioners were justifiably deprived of the right to continue the Stephenson

action (for wrongs during a shorter period to be sure). Respondents offer no specific reason for such deprivation and consequent unearned windfall by the wrongdoing fiduciaries.

3. It is too pat an answer to state that the summary dismissal at bar was justified by an examination of the entire record, where not a single credible reason is proffered to substantiate such conclusion.

4. Few more compelling reasons can be imagined for the exercise of the Supreme Court's powers of supervision under Rule 19(1)(b) than deprivation of access to a Federal court which already had jurisdiction over a cause, following the death of the sole plaintiff.

5. Apart from the point that Rule 25(a) FRCP simply does not contain any requirement for the filing of an amended complaint upon a motion for substitution based on death, it was not even essential to have an amended complaint at bar in any event. A ruling (as at bar) that only post-February 24, 1969 wrongs could be prosecuted by Petitioners, actually should not require an amended complaint (although concededly a direction therefor would not be out of order). Where a complaint alleges wrongs prior and subsequent to a certain date, and pre-date wrongs are barred for one reason or another, a ruling imposing such bar is conclusive enough, and the action can proceed under an existing complaint subject to the ruling. Hence it was appropriate at bar to grant the motion for substitution and to restrict Petitioners to wrongs subsequent to February 24, 1969, which both courts below held could be prosecuted by Petitioners for Clawson's benefit.

6. Contrary to the contention of Respondents that, upon the death of Stephenson the Petitioners automatically lost their capacity to sue derivatively in Clawson's behalf because the trust would end one day (a contention rejected

in the District Court and Court of Appeals), the demise of Stephenson did not in the least relieve the Trustees from their bounden duty, under universal law, to continue to administer the trust with prudence, diligence and fidelity, including the right, if not the duty, to assert stockholders' derivative rights in appropriate cases—and these functions do not end until actual termination of a trust, the closing elements of which are an accounting, conveyance of trust property to the persons entitled thereto, and discharge of the Trustees (see cases at p. 13 of Petition). None of these closing elements has taken place.

Conclusion

Respondents have utterly failed to demonstrate why they were entitled to the unearned windfall produced by the summary dismissal of the action. The petition, which shows meritorious reasons for the exercise by the Supreme Court of its supervisory powers under Rule 19(1)(b), ought to be granted.

Dated, New York, N. Y., October 24, 1972.

Respectfully submitted,

ABRAHAM K. WEBER,
Counsel for Petitioners.